

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

VERITAS HEALTH SERVICES, INC., d/b/a
CHINO VALLEY MEDICAL CENTER

And

Case 31-CA-107321

UNITED NURSES ASSOCIATIONS OF
CALIFORNIA/UNION OF HEALTH CARE
PROFESSIONALS, NUHHCE, AFSCME
AFL-CIO,

John Rubin, Esq., Los Angeles, California
on behalf of the General Counsel.

Lisa C. Demidovich, Esq., San Dimas, California
on behalf of the Charging Party

Coleen Hanrahan, Esq., (DLA PIPER, LLP)
Washington, D.C., on behalf of the Respondent.

DECISION

Statement of the Case

JOHN J. MCCARRICK, Administrative Law Judge: This case was tried in Los Angeles, California, on November 18, 2014, upon the Amended Complaint and Notice of Hearing issued on August 11, 2014, by the Acting Regional Director for Region 31.

The complaint alleges that Veritas Health Services, Inc., d/b/a Chino Valley Medical Center, Respondent, violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from United Nurses Associations of California/Union of Health Care Professionals, NUHHCE, AFSCME, AFL-CIO, (Union).

Respondent filed a timely answer to the complaint stating it had committed no wrongdoing.

Findings of Fact

Upon the entire record herein, including the briefs from Counsel for the General Counsel, Charging Party and Respondent, I make the following findings of fact.¹

¹ On February 24, 2014, bargaining unit employee Jose Lopez, Jr. filed a motion to intervene in these proceedings. General Counsel's exhibit 1(n). On March 3, 2014, Associate Chief Administrative Law Judge Gerald Etchingham issued his order denying Lopez' motion. General Counsel's exhibit 1(u). At the commencement of the hearing herein, Mr. Lopez renewed his motion to intervene. Offering no new evidence or argument in support of his motion, it was denied.

I. Jurisdiction

Respondent stipulated² and I find that is a California corporation located in Chino, California where it has been engaged in the business of operation of an acute care hospital. In the operation of the hospital, during the last 12 months, Respondent has derived gross revenues in excess of \$250,000 and has purchase goods and services valued in excess of \$5,000 directly from points outside the State of California. It further stipulated and I find that it is an employer engaged in interstate commerce within the meaning of Sections 2(2), (6) and (7) of the Act and a healthcare institution within the meaning of Section 2(14) of the Act.³

II. Labor Organization

The parties further stipulated⁴ and I find that United Nurses Associations of California/Union of Health Care Professionals, NUHHCE, AFSCME, AFL-CIO, (Union) is a labor organization within the meaning of Section 2(5) of the Act..

III. The Alleged Unfair Labor Practices

A. Background facts

This case has a long history dating to an initial election conducted in May 2008 in case 31-RC-8689 that the Union lost. A Report and Recommendation on Objections issued January 16, 2009 found Respondent committed objectionable conduct affecting the outcome of the election.⁵ The Union withdrew its objections on February 2, 2009. In case 31-RC-8795, on February 22, 2010, the Union filed a petition for election among the per diem registered nurses employed by Respondent.⁶ In April 2010 the Union won the election and Respondent filed objections to the election. On January 25, 2011, the Board overruled Respondent's objections and certified⁷ the Union as the exclusive collective bargaining representative of all full time and regular part-time per diem registered nurses employed by Respondent at its Chino facility. (*Veritas I*) On April 12, 2011, the Board, issued its decision in *Veritas Health Services, Inc.*, 356 NLRB No. 137 (2011) (*Veritas II*)⁸ finding that Respondent had failed and refused to recognize and bargain with the Union in the certified bargaining unit. The Board ordered Respondent to bargain in good faith with the Union and also ordered a *Mar-Jac* extension of the certification year. Respondent appealed the Board's decision and on March 13, 2012 the United States Court of Appeals for the District of Columbia Circuit issued its order⁹ enforcing the Board's April 12, 2011 decision and order in *Veritas II*.

Meanwhile, on October 17, 2011, Administrative Law Judge William Kocol issued his decision¹⁰ finding that from March 2010 through June 2010 Respondent had violated Sections 8(a)(1) of the Act by:

² Joint exhibit 62.

³ Ibid.

⁴ Ibid.

⁵ Joint exhibit 1, note 2.

⁶ Ibid.

⁷ Joint exhibit 2.

⁸ Joint exhibit 3.

⁹ Joint exhibit 4.

¹⁰ Joint exhibit 5, page5.

threatening to close its Chino facility and terminate employees if they selected a union, threatened employees with loss of benefits if the selected the Union as collective bargaining representative, coercively interrogated employees about their union activities, impliedly threatened employees with layoffs if they supported a union, told employees they might lose the family atmosphere and flexibility of scheduling at Chino Valley if the selected the Union, gave employees the impression that their union activities were under surveillance, threatened to discipline employees because they engaged in union activities, told employees they could no longer take vacations longer than 2 weeks because the employees had selected the Union to represent them, told employees that the family atmosphere at Chino Valley was over and that henceforth Chino Valley would begin strictly enforcing its policies and procedures, including tardiness, because the employees voted for the Union, broadly prohibited employees from speaking to the media including about the Union or about terms and conditions of employment, and by serving subpoenas on employees and unions that request information about employees' union activities, under circumstances where that information is not related to any issue in the legal proceeding. Judge Kocol found Respondent violated Section 8(a)(3) and (1) of the Act by: more strictly enforcing a tardiness rule and disciplining employees pursuant to that more strictly enforced rule because employees supported the Union, disciplining employees who failed to attend mandatory meetings because employees supported the Union, and by discharging Ronald Magsino because he and other employees supported the Union. Finally Judge Kocol found Respondent violated Section 8(a)(5) and (1) of the Act by: more strictly enforcing a tardiness rule and disciplining employees pursuant to that more strictly enforced rule without first giving the Union an opportunity to bargain concerning the change, beginning to discipline employees who had failed to attend mandatory meetings without first giving the Union an opportunity to bargain concerning the change, terminating the practice of paying part-time employees for the time spent attending classes needed to maintain the certifications necessary to perform their work at Chino Valley without first giving the Union an opportunity to bargain concerning the change, and by failing to provide requested information that is presumptively relevant to the Union's performance of its representational duties.

On April 30, 2013, the Board affirmed Judge Kocol's decision in *Veritas Health Services, Inc.*, 359 NLRB No. 111 (2013).¹¹ (*Veritas III*) The Board's order issued during that period of time when the Supreme Court found that certain Board members had been invalidly appointed by the President. *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014) (Noel Canning). On June 27, 2014, the Board issued an Order¹² setting aside the Decision and Order in *Veritas III* in response to *Noel Canning*. On August 25, 2014, D.C. Circuit Case 13-1163 was dismissed upon motion of the Board. *Veritas III* is currently pending before the Board.¹³

While the Board's decision in *Veritas III*, may not be of precedential value at the present time, as noted above, Judge Kocol has made findings concerning Respondent's commission of unfair labor practices. While Judge Kocol's decision is not final, it is appropriate to consider and rely on those findings in deciding the issues in this case. The issues decided by Judge Kocol were fully litigated before him, and relitigating or revisiting those issues de novo in this related proceeding, while the matter is before the Board, would be antithetical to judicial efficiency and economy and potentially lead to inconsistent results and unnecessary delays. See *Wynn Las Vegas, LLC*, 358 NLRB No. 81 fn. 1 & JD. at 4–5 (2012); *Grand Rapids Press of Booth Newspapers*, 327 NLRB 393, 394–395 (1998), enf. mem. 215 F.3d 1327 (6th Cir. 2000); and *Detroit Newspapers Agency*, 326 NLRB 782 fn. 3 (1998), enf. denied on other grounds 216 F.3d 109 (D.C Cir. 2000).

¹¹ Ibid. at page 1.

¹² Joint exhibit 60, page 5..

¹³ Joint exhibit 61.

B. The facts of this case

1. The parties' bargaining history

5 During collective bargaining in this case Respondent was represented by its chief negotiator Respondent's assistant general counsel, Mary Schottmiller (Schottmiller). Respondent admitted Schottmiller was an agent of Respondent within the meaning of Section 2(13) of the Act. The Union was represented in bargaining by its director of collective bargaining and representation Barbara Lewis (Lewis) and Union representative Penny Brown (Brown).

10 After the March 13, 2012, United States Court of Appeals for the District of Columbia Circuit order enforcing the Board's April 12, 2011 decision and order in *Veritas II*, on March 20, 2012, Union president Ken Deitz (Deitz) sent a letter¹⁴ to Respondent's chief medical officer, James Lally (Lally), requesting bargaining for the per diem RN bargaining unit. In this letter, Deitz also requested that
15 Respondent provide information for bargaining a first collective-bargaining agreement. That same day, Chino requested from the Union "the available dates you have for negotiations so we can get started right away."¹⁵

20 The record reflects that due to the years that had passed since the original organizing campaign, because there had been no information provided to the Union by Respondent to prepare for bargaining and because there had been much turnover in the bargaining unit, the Union had to engage in extensive preparation work for bargaining. By comparing the April 2010 Excelsior list to Respondent's RN list produced in Spring 2012, the Union concluded that there had been a 47-49% turnover of RNs in the bargaining unit from 2010 to 2012. Absent access to Respondent's facility, the Union needed Respondent
25 to produce a list of bargaining unit employees' names and addresses, in order to contact them.

The record reflects that the Union had to obtain contracts other unions had with Prime Healthcare hospitals in order to formulate proposals. Because of the lengthy delay in bargaining the Union also had to meet with bargaining unit employees to draft proposals and review them with the bargaining team,
30 which was not yet in existence in March 2012.

On April 20, 2012, Lewis wrote to Schottmiller proposing bargaining to commence on June 13 and 14, 2012.¹⁶ Schottmiller agreed that negotiations would begin on June 13 and 14.¹⁷

35 From June 13, 2012 to May 24, 2013, the parties engaged in over twenty five bargaining sessions¹⁸ and by May 24, 2013, the parties had reached tentative agreement on twenty-eight articles.¹⁹ Tentative agreements were reflected by the parties' initialing and dating those agreed upon articles.²⁰

40 On May 24, 2013, the only proposals the parties had not agreed upon were Compensation (Article 13), 401k (Article 28), and a new Article entitled Full Negotiations, Complete Agreement and Waiver and Most Favored Nation clause (Article 30).²¹

14 Joint exhibit 10.

15 Joint exhibit 11.

16 Joint exhibit 12.

17 Joint exhibit 13.

18 Joint exhibit 62 at paragraph 8.

19 Ibid. at paragraph 9.

20 Ibid. at paragraph 10.

At the August 7, 2012 bargaining session, Respondent gave the Union a proposal on Article 28-401(k).²² At the September 13, 2012 bargaining session, Respondent provided the Union with a proposal on Full Negotiations, Complete Agreement and Waiver.²³

At the October 9, 2012 bargaining session, the Union gave Respondent with a proposal on Article 30, Most Favored Nation Clause, which Respondent rejected.²⁴

At the May 24, 2013 bargaining session, Respondent provided the Union with a proposal regarding Article 13-Compensation.²⁵ On May 28, 2013, Lewis, requested that Schottmiller send Schottmiller's May 24, 2013 proposal on Article 13 Compensation by email²⁶ and on May 29, 2013, Schottmiller sent the proposal to Lewis.²⁷

On June 10, 2013, the Union sent a letter to Schottmiller advising her that the Union was accepting Respondent's Article 13 proposal, that the Union was accepting Respondent's other two outstanding proposals on Article 28-401(k) and the New Article entitled Full Negotiations, Complete Agreement and Waiver, and that the Union was withdrawing its remaining proposal on Article 30-Most Favored Nation Clause.²⁸ This letter was delivered via courier service on June 10, 2013 at 3:41 p.m.²⁹ In the letter Lewis signed off on the three articles that the parties had reached agreement on to represent the Union's tentative agreement and requested that Schottmiller sign them and send them back for the Union's records. According to Lewis' un rebutted and credited testimony, as of June 10, 2013, Respondent had not withdrawn any of its proposals.

While there was no written tentative agreement on the term of the collective bargaining agreement, according to Lewis' and Brown's uncontradicted and credited testimony, early in bargaining, Schottmiller had raised the idea of a four-year contract which the Union rejected and in turn proposed a three-year term, to which Schottmiller agreed. This understanding is consistent with the economic proposals between the parties which reflect a three-year term.

2. Withdrawal of Recognition

After receiving Lewis' June 10, 2013 letter accepting the Respondent's remaining proposals, Schottmiller emailed the Union on June 10, 2013 at 5:09pm, with an attached letter dated June 9, 2013 that stated Respondent had, "... received objective evidence on June 9, 2013 that a majority of employees in the certified/recognized unit no longer wish to be represented by your union. Accordingly, Chino will not continue negotiations with your union for a collective bargaining agreement."³⁰

²¹ Ibid. at paragraph 11.

²² Ibid. at paragraph 11(a).

²³ Ibid. at paragraph 11(b).

²⁴ Ibid. at paragraph 11(c).

²⁵ Ibid. at paragraph 11(d).

²⁶ Joint exhibit 49.

²⁷ Joint exhibit 50.

²⁸ Joint exhibit 51.

²⁹ Joint exhibit 52.

³⁰ Joint exhibit 53.

On June 13, 2013, Schottmiller sent another letter³¹ to Lewis stating that her June 9, 2013, letter was sent in error and that Schottmiller was, " . . . hereby revoking and rescinding that letter." In this letter Schottmiller admitted that she had received the Union's June 10, 2013 letter accepting Respondent's proposals. However she stated further:

Because you have accepted proposals that were no longer were on the table, we are treating your acceptance as a counter-proposal subject to the company's acceptance.

* * * *

At this point, as Chino Valley Medical Center has notice that a majority of unit employees no longer support UNAC, it would be unlawful for the employer to enter into an agreement with UNAC. Accordingly, based on objective evidence that UNAC no longer represents a majority of employees in the bargaining unit, Chino Valley Medical Center is withdrawing recognition from UNAC.

On June 14, 2013, Lewis responded to Schottmiller by letter³² in which she noted:

After receipt of our June 10 letter, you emailed to me a letter withdrawing recognition and declaring that you would not continue negotiations. Further negotiations, however, were not needed as the parties had already reached agreement on all outstanding issues, and had a binding contract.

Three days later, you revoked and rescinded your June 10 letter, claiming for the first time that the Employer's three outstanding proposals "no longer were on the table." The Employer and you, however, never previously took your proposals off the table.

There is no evidence that Respondent ever told the Union that its proposals were withdrawn. Moreover, Respondent failed to offer into the record any evidence it may have relied upon when withdrawing recognition. While in its brief Respondent refers to a decertification petition circulated among bargaining unit employees and that a majority of bargaining unit employees had signed the petition, there is no evidence of such a petition, its circulation or how many employees signed the petition in the record.

C. The analysis

a. Respondent's Withdrawal of Recognition

Complaint paragraphs 8 and 9 allege that on June 10 and 13, 2013, Respondent withdrew recognition of the Union in violation of Section 8(a)(5) of the Act.

1. Validity of the decertification petition given the unremedied unfair labor practices

A respondent may not avoid the duty to bargain by claiming that a union has lost majority status where that loss has been caused by its own unfair labor practices. *NLRB v. Williams Enterprises*, 50 F.3d 1280, 1288 (4th Cir. 1995). Likewise, the Board in *LTD Ceramics, Inc.*, 341 N.L.R.B. 86 (2004) held that:

³¹ Joint exhibit 57.

³² Joint exhibit 58.

Evidence in support of a withdrawal of recognition, “must be raised in a context free of unfair labor practices of the sort likely, under all the circumstances, to affect the union’s status, cause employee disaffection, or improperly affect the bargaining relationship itself.” *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996) (*Lee Lumber II*), *affd. in part and remanded in part* 117 F.3d 1454 (D.C. Cir. 1997), citing *Guerdon Industries*, 218 NLRB 658, 659, 661 (1975).

In *Lee Lumber II*, the Board held that in order to show that unfair labor practices taint a union’s loss of majority support, there must be proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support. To determine whether a causal relationship has been established the following factors must be considered: the length of time between the unfair labor practice and the withdrawal of recognition, the nature of the violation, including the possibility of a detrimental or lasting effect on employees, the tendency to cause employee disaffection, and the effect of the unlawful conduct on employees’ morale, organizational activities, and membership in the union. *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

In *Penn Tank Lines, Inc.*, 336 NLRB 1066, 1067-1068 (2001), the Board found that a respondent’s unfair labor practices tainted a union loss of majority even where the unfair labor practice occurred five months before the loss of majority. In so finding the Board found that the termination of a union supporter was especially coercive and not likely to be forgotten, even over a period of years because the discharge of an active union supporter is exceptionally coercive and not likely to be forgotten going to the very heart of the Act, reinforcing employees’ fear that they will be fired if they engage in union activity. *Koons Ford of Annapolis*, 282 NLRB 506, 508 (1986), *enfd.* 833 F.2d 310 (4th Cir. 1987). Likewise in *United Supermarkets*, 287 NLRB 119, 120 (1987), where a petition was received six years after the employer’s unfair labor practices, including the discharge of union supporters, the Board found the petition had been tainted by the unremedied unfair labor practices.

Here in *Veritas III*, the Board affirmed Judge Kocol’s October 17, 2011, decision finding that Respondent, during the 2010 organizing campaign, had committed a multitude of hall mark violations of the Act, including threats to fire employees, threats to close the facility and firing a union supporter.

Not until the March 13, 2012, decision of the United States Court of Appeals for the District of Columbia Circuit enforcing the Board’s April 12, 2011 decision and order in *Veritas II*. did the parties begin collective bargaining in June 2012. On June 10, 2013 Respondent withdrew recognition from the Union.

Respondent contends that a sufficient period of time passed between the commission of the unremedied unfair labor practices in 2010 and the withdrawal of recognition in 2013 to ameliorate the effect of the unfair labor practices citing *Champion Enterprises, Inc.*, 350 N.L.R.B. 788, 791 (2007), *Garden Ridge Management, Inc.*, 347 NLRB 131,134 (2006), and *Lexus of Concord, Inc.*, 343 N.L.R.B. 851, 852 (2004). These cases are inapposite. In each case Respondent has cited, the Board was faced with isolated or minor unfair labor practices that it found did not taint the petition. In *Champion* the Board found that the nature of the violations did not support a finding of taint since the respondent’s confiscation of union materials from an employee workstation and the threat to an employee were isolated events involving one employee each. In *Garden Ridge*, the Board found no specific proof that the respondent’s unlawful refusal to meet at reasonable times caused the Union’s loss of majority support. In *Lexus of Concord, Inc.*, 343 N.L.R.B. 851, 852 (2004) the Board found that while the Respondent placed an employee in an installer position without bargaining with the union 3 months before withdrawing recognition, there was no showing that the transfer had a detrimental or lasting effect on employees.

Unlike the cases cited above, here, the unremedied unfair labor practices were numerous and egregious, occurring in the context of an organizing campaign. This case is more akin to *United*

Supermarkets, supra, and are the Respondent's unfair labor practices are the sort that cause disaffection among employees, leading to withdrawal of support from the Union. Under these circumstances, Respondent is barred from withdrawing recognition from the Union.

5

2. Certification year

Both General Counsel and the Union contend that Respondent withdrew recognition during the extended certification year. Respondent takes the position that the certification year should not have commenced with the first bargaining session on June 13, 2012, because the Union caused unreasonable delay in bargaining. *Dominguez Valley Hospital*, 287 NLRB 149, 150 (1987). Respondent further argues that the petitions signed a few days before the certification year expired does not justify forcing upon unit employees an unwanted union, citing *Ltd. Ceramics, Inc.*, 341 N.L.R.B. 86, 88, 94 (2004).

It is well established that a union is entitled to a conclusive presumption of majority status during the certification year even if an employer has evidence of loss of the union's majority support. Further, an employer may not withdraw recognition outside the certification year where the evidence of loss of majority support is obtained during the certification year. *Chelsea Industries*, 331 NLRB 1648 (2000).

Here, General Counsel and the Union contend that the certification year extension ran from June 13, 2012 to June 12, 2013, because the Board ordered a *Mar-Jac* extension of the certification year remedy for Respondent in *Veritas II*. Since Respondent refused to recognize and bargain with the Union, the Board's order was not enforced until March 13, 2012. The Board has held that when an employer refuses to bargain with a union while pursuing judicial review, the certification year begins on the date of the parties' first formal bargaining session following judicial enforcement of the Board's Order. *Virginia Mason Medical Center*, 350 NLRB 923, 923 (2007).

In *Van Dorn Plastic Machinery Co.*, 300 N.L.R.B. 278, the Board cited *Dominguez Valley Hospital*, 287 NLRB 149, 150 (1987), *enfd.* 907 F.2d 905 (9th Cir. 1990), and held that, under circumstances similar to the instant case, some time can reasonably be allowed before the certification year begins for the union to reestablish contacts with unit employees to facilitate bargaining on their behalf. The Board rejected the argument that the certification year should commence when an employer expresses its willingness to bargain. The Board recognized that where the election was held years before bargaining commences, this justifies the union having time to reestablish contacts with unit employees to facilitate bargaining.

On March 20, 2012, Union president Deitz requested bargaining of Respondent for the certified RN bargaining unit. Deitz also requested that Respondent provide information relevant and necessary for bargaining a collective-bargaining agreement. That same day, Respondent requested from the Union available dates for negotiations. On April 20, 2012, the Union proposed bargaining to commence on June 13, 2012, to which Respondent agreed.

While Respondent contends that the Union engaged in a bad-faith delay in the commencement of bargaining, the record reflects that the Union had to do much work prior to beginning bargaining. The evidence shows that Union needed to re-establish contacts with the bargaining unit, which was difficult since there had been a 50% turnover rate. In addition, the Union promptly requested information that it was required to analyze. The Union had to reformulate a bargaining committee, train it, and formulate proposals. I find there was no inordinate delay in the Union beginning bargaining with Respondent and that the certification year should have commenced on June 13, 2012.

Respondent contends that even if the certification year commenced on June 13, 2012, as the General Counsel contends, the fact that the signatures were collected a few days before the end of the certification year is of no consequence, citing *LTD Ceramics, Inc.*, 341 N.L.R.B. 86, 88, 94 (2004). In

LTD Ceramics on July 21, an employee presented the Respondent with a decertification petition signed by 97 of 171 employees in the bargaining unit. Forty-nine of these signatures were dated July 15, the final day of the Union’s certification year. The rest were dated from July 16 to 20. On the basis of this petition, the Board found that the respondent validly withdrew recognition from the union. In *LTD* the Board distinguished *Chelsea Industries*, 331 NLRB 1648 (2000), where the Board held that an employer could not withdraw recognition on the basis of a decertification petition signed by employees and received by the employer 5 months before the end of the certification year.

Here Respondent chose not to offer the petition it received from bargaining unit employees into evidence. Thus it is impossible to determine when employee signatures were collected. It is safe to say that the employee signatures were collected prior to June 9, 2013, when Respondent received the petition and within the certification year. Thus, this case is distinguishable from *LTD Ceramics*.

I find that the Respondent’s withdrawal of recognition was further invalid since the petition and the evidence contained in the petition was obtained during the certification year.

3. The evidence of lost majority

The test for an employer’s withdrawal of recognition from a union is no longer the good faith doubt test but whether the employer is in possession of evidence that the union has in fact lost majority support. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001). Under *Levitz*, the essential element to establish a lawful withdrawal of recognition by an employer is whether the employer had evidence that the Union had lost majority support at the time it withdrew recognition. In *Alpha Associates*, 344 NLRB 782, 784-785 (2005), the Board held that, “an employer may withdraw recognition from the union only if it possesses evidence that the union has in fact lost majority support.”

Here, Respondent has not introduced any evidence to support its assertion that it possessed evidence that the Union had lost majority support of bargaining unit employees at the time it withdrew recognition.

In her brief Counsel for Respondent suggests that I ruled she could not offer Respondent’s exhibit 8, the decertification petition, noting my partial comment on the implications of the Board’s *Levitz Furniture Co.*, 333 NLRB 717 (2001) and *Alpha Associates*, 344 NLRB 782, 784-785 (2005) decisions:

[B]asically proof of objective considerations to justify withdrawal of recognition is a burden of the Employer. And it’s a burden they have to establish at the time they receive the documents. So, . . . if somebody from the Employer . . . didn’t authenticate all of these signatures at the time they received it, as far as I’m concerned, the objective considerations are invalid. You can’t come in now and say “Oh, by the way, we’ll show who they were.” No, you had to do it then (Tr. 183, lines 18-25 and Tr. 184, lines 1-2.)

Counsel’s contention misrepresents the exchange that took place. At the commencement of Respondent’s case in chief, Respondent’s Counsel sought a stipulation that Respondent’s exhibit 8, a decertification petition, be received by stipulation of the parties. Counsel for the General Counsel and Counsel for Charging Party refused to stipulate to the authenticity of the signatures on the petition. After extensive discussion as to who could authenticate the signatures on the petition and the necessity for Respondent to prove under *Levitz* that it had evidence that a majority of bargaining unit employees had signed a petition, I told Respondent’s counsel that she would have the opportunity to offer and authenticate the petition saying:

You can’t come in now and say “Oh, by the way, we’ll show who they were.” No, you

had to do it then to have a good faith doubt at that point in time. You have to have proof, not good faith. It's not good faith, it's did you have proof that the Union had lost the majority. Now, maybe you can establish that, maybe you did that, I don't know. I'll give you an opportunity to show it. Okay? So, that's where I'm going with that. With respect to RX-8, that's something that Respondent's witness will have to establish. Tr. 184 lines 1-9

It is clear from a complete reading of the transcript that I in no way foreclosed Respondent's ability to authenticate and offer Respondent's exhibit 8. Indeed, I made it quite clear I was giving counsel every opportunity to do so. Rather than attempt to offer Respondent's exhibit 8, Counsel for Respondent chose to offer no proof whatsoever of the evidence in support of its withdrawal of recognition from the Union.

Based upon the above, I find that Respondent unlawfully withdrew recognition from the Union in violation of Section 8(a)(5) and (1) of the Act.

Conclusions of Law

1. Respondent Veritas Health Services, Inc., dba Chino Valley Medical Center is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Nurses Associations of California/Union of Health Care Professionals, NUHHCE, AFSME, AFL-CIO (Union), is a labor organization within the meaning of Section 2(5) of the Act and is the exclusive collective bargaining representative of Respondent's employees in the following appropriate collective bargaining unit:

All full-time, regular, part-time and regular per diem nurses employed by the employer at its 5451 Walnut Avenue, Chino, California facility in the following departments: emergency services, critical care services/intensive care unit, surgery, post-anesthesia care unit, outpatient services, gastrointestinal laboratory, cardiovascular catheterization laboratory, radiology, telemetry/direct observation unit and medical/surgical.

3. By withdrawing recognition of and refusing to bargain with the Union the Respondent committed unfair labor practices in violation of Section 8(a)(5) and (1) of the Act:

REMEDY

As part of the remedy herein General Counsel seeks an order that the parties to return to the table and bargain on the only remaining unresolved subject, the effective date of the agreement.

By May 24, 2013, the parties had reached tentative agreement on twenty-eight articles and the only proposals the parties had not agreed upon were Compensation (Article 13), 401k (Article 28), and a new Article entitled Full Negotiations, Complete Agreement and Waiver and Most Favored Nation clause (Article 30).

On June 10, 2013, the Union sent a letter to Respondent advising that the Union was accepting Respondent's Article 13 proposal, that the Union was accepting Respondent's other two outstanding proposals on Article 28-401(k), the New Article entitled Full Negotiations, Complete Agreement and Waiver and that the Union was withdrawing its remaining proposal on Article 30-Most Favored Nation Clause. As of June 10, 2013, Respondent had not withdrawn any of its proposals.

While there was no written tentative agreement on the term of the collective bargaining agreement, the record reflects that during bargaining Respondent had raised the idea of a four-year contract which the Union rejected and in turn proposed a three-year term, to which Respondent agreed. This understanding is consistent with the economic proposals between the parties which reflect a three-year term.

Where there is no express written agreement, the Board will infer an agreement from all of the circumstances regarding term and effective dates where there exists evidence that the parties had in fact reached agreement. *Transit Service Corp.*, 312 NLRB 477, 481- 482 (1993); *Sunglass Products dba Personal Optics*, 342 NLRB 958, 962 (2004).

From all of the evidence I find that the parties had agreed to all of the terms of the collective bargaining agreement including a three year term for the collective bargaining agreement. However, it does not appear there is evidence the parties agreed to the effective date of the agreement.

In *Sheridan Manor Nursing Home, Inc.*, 329 NLRB 476, 478-479 (1999), a case remarkably similar to the instant case, the Board found that the respondent unlawfully withdrew recognition from the union after the parties had reached tentative agreement on all material subjects except for the effective date of the collective bargaining agreement. While the Board found no violation of Section 8(a)(5) of the Act for refusal to execute the agreement, since there was no understanding concerning the contract's effective date, it nevertheless ordered the respondent to return to the bargaining table for the sole purpose of bargaining about the effective date.

Following the Board's mandate in *Sheridan Manor*, I will order that Respondent bargain with the Union over only the effective date of the agreement.

In addition, as part of the remedy, the Union seeks an order awarding its bargaining costs, litigation expenses incurred herein, an extension of the certification year and a notice reading.

Bargaining costs

The Union contends that the remedy of bargaining costs should be awarded here because it claims Respondent's have infected the core of a bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies, citing *Unbelievable, Inc.*, 318 NLRB 857, 859 (1995), *Whitesell Corporation*, 357 NLRB No. 97, slip op. at 5 (2011) and *Fallbrook Hospital Corporation*, 360 NLRB No. 73, slip op. at 2 (2014). The Board found in *Unbelievable*, *Whitesell* and *Fallbrook* that the respondents engaged in egregious surface bargaining designed to thwart the bargaining process.

The Union seems to argue that Respondent engaged in bad faith bargaining during contract negotiations. However, this has not been alleged in the complaint herein and I have made no such finding. Here the parties engaged in good faith bargaining in over 25 sessions in a year's time. The parties, as found above, agreed to all the terms of a collective bargaining agreement save its effective date. My order will require the parties to resume bargaining to determine only the effective date of their agreement. Given that virtually all terms of the collective bargaining agreement were agreed to, I do not find that Respondent's conduct in bargaining herein was intended to thwart the bargaining process or to waste the Union's time. Under these circumstances I do not agree that imposing the costs of the Union's bargaining is warranted.

Litigation expenses because of Respondent's frivolous defense

The Union also seeks litigation expenses in this proceeding since Respondent put on no case-in-chief, called no witnesses, and failed to enter any admissible exhibits into the record.

The Board has awarded litigation costs where a respondent asserts frivolous defenses or otherwise exhibits bad faith in the conduct of litigation. *HTH Corporation*, 361 NLRB No. 65, slip op. at 3-4 (2014); *Camelot Terrace*, 357 NLRB No. 161 slip op. at page 4(2011); *Teamsters Local 122*, 334 NLRB 1190, 1193 (2001); *Alwin Mfg. Co.*, 326 NLRB 646, 647 (1998), enfd. 192 F.3d 133 (D.C. Cir. 1999); *Lake Holiday Manor*, 325 NLRB 469, 469 fn. 5 (1998). While failing to call witnesses does not alone make a respondent's position "frivolous" for the purpose of receiving litigation expenses, the respondent must have otherwise made legitimate contentions. *Three Sisters Sportswear Co.*, at 897. Litigation expenses have been awarded where the respondent failed to put on any defense because failing to put on any defense has been found by the Board to be a frivolous defense. *Teamsters Local 122* at 1194.

In *Three Sisters* both the ALJ and the Board declined to impose litigation expenses even where respondents called no witnesses and presented no defense to any of the unfair labor practices alleged. The board agreed with the ALJ's definition of frivolous litigation as involving defenses that are not merely found to be without merit, but are contentions "which are clearly meritless on their face." *Heck's, Inc.*, 191 NLRB 886, 889 (1971). The Board agreed with the ALJ that defenses are debatable rather than frivolous, where allegations are dependent on resolutions of credibility.

In *Teamsters Local 122* the respondent union engaged in pervasive and unlawful bad faith bargaining with the object of compelling the employer to sell its business by engaging in a strategy of delay at the bargaining table. The Board found this strategy was carried over into the Boards' proceedings through respondent's inexorable and wasteful cross examination and by its failure to mount any defenses.

In *HTH Corporation*, the Board awarded litigation expenses in the face of pervasive, repeated, and unremedied violations of the Act and violations of the District Court 10(j) order.

Here, Respondent for a two year period refused to recognize and bargain with the Union until ordered to do so by the Court of Appeals in 2012. Thereafter the parties engaged in what appears to have been good faith bargaining for a period of one year, resulting in agreement on all terms save for the effective date of the contract. However, when the Union agreed to the final outstanding terms of the agreement, Respondent withdrew recognition, and refused any further bargaining with the Union allegedly due to evidence that the Union had lost the support of a majority of the bargaining unit employees. After complaint issued, Respondent proffered by way of defense in its answer that the Union had unclean hands, that the Union bargained in bad faith, that the Union did not represent a majority of bargaining unit employees, that the Union's conduct disqualified it as representative of the employees, that the Union breached its fiduciary duty to unit employees and that the Union engaged in conduct to thwart unit employees Section 7 rights.

Respondent's entire defense rests upon its right to withdraw recognition from the Union and cease bargaining.³³ As discussed above, under *Levitz*, an employer has the burden of proof of showing that at the time it withdraws recognition from the Union, it has evidence that the Union has lost the support of a majority of employees in the bargaining unit. After General Counsel presented its case and established that the Union was the certified representative of bargaining unit employees, that the parties had agreed to all terms of a collective bargaining agreement save the effective date and rested, I advised

³³ I find that Respondent's other six affirmative defenses were frivolous and unsupported by any facts or case law.

Respondent that it would have an opportunity to establish that it had evidence that the Union had lost majority support of the unit employees. Respondent chose to proffer no evidence in its defense.

I find that this case is unlike *Three Sisters* in that none of the issues herein turned on credibility and there were no debatable issues raised in the record. Here there is no issue of credibility with respect to the Respondent's unlawful withdrawal of recognition. In the absence of evidence in its defense there is no defense. I find this frivolous defense amounted to a waste of the Board's limited time and resources.

Under such circumstances I shall order the Respondent to reimburse the General Counsel and the Union the costs and expenses incurred in the investigation, preparation, presentation, and conduct of the present proceeding before the Board, including reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diems, and other reasonable costs and expenses. These costs shall be determined at the compliance stage.

Extension of the certification year

Given my finding that no withdrawal of recognition from the Union is appropriate until Respondent remedies its past unfair labor practices which will entail a lengthy compliance period, given the absence of evidence of bad faith in bargaining from June 13, 2012 to June 10, 2013, given that all terms of the collective bargaining agreement have been reached save the effective date, I find it unnecessary to extend the certification year.

Public notice reading

The Board has found that a notice reading is an effective remedy where the Respondent's unfair labor practices are so numerous, pervasive, and outrageous that such remedies are necessary to dissipate fully the coercive effects of the unfair labor practices found. *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003) citing *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995).

Here, Respondent has engaged in numerous and serious unfair labor practices during the organizing campaign and has failed to remedy them. While a period of two years passed between commission of the pervasive and egregious unfair labor practices during the organizing campaign and commencement of bargaining, Respondent has continued to engage in conduct designed to deprive its employee of their collective bargaining rights by unlawfully withdrawing recognition from the Union in June 2013. Such repeated unlawful conduct has likely had the effect of chilling employees' Section 7 activities and in order fully dissipate their coercive effect, a notice reading is appropriate. The notice shall also be read in the presence of all unit employees by a responsible management official or by a Board agent, in the presence of a management official.

The Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB No. 8 (Oct. 22, 2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁴

³⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Veritas Health Services, Inc., dba Chino Valley Medical Center Chino, California, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Refusing to recognize and bargain in good faith with United Nurses Associations of California/Union of Health Care Professionals, NUHHCE, AFSME, AFL-CIO the exclusive collective bargaining representative of its employees in the following collective bargaining unit:

All full-time, regular, part-time and regular per diem nurses employed by the employer at its 5451 Walnut Avenue, Chino, California facility in the following departments: emergency services, critical care services/intensive care unit, surgery, post-anesthesia care unit, outpatient services, gastrointestinal laboratory, cardiovascular catheterization laboratory, radiology, telemetry/direct observation unit and medical/surgicalIncluded:

(b) Refusing to bargain in good faith with the Union by withdrawing recognition of the Union as the exclusive collective bargaining representative of bargaining unit employees on August 19, 2013.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) The Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB No. 8 (Oct. 22, 2010).

(b) Reimburse the General Counsel and the Union the costs and expenses incurred in the investigation, preparation, presentation, and conduct of the present proceeding before the Board, including reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diems, and other reasonable costs and expenses. These costs shall be determined at the compliance stage.

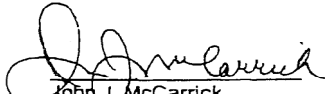
(c) The notice to employees shall also be read in the presence of all unit employees by a responsible management official or by a Board agent, in the presence of a management official.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Chino, California, copies of the attached notice marked "Appendix."³⁵ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places
 5 where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since
 10 June 10, 2013.

(f) Within 21 days after service by the Region, filed with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

15 Dated, Washington, D.C. March 3, 2015

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 John J. McCarrick
 Administrative Law Judge

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³⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

After a trial at which we appeared, argued and presented evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has directed us to post this notice to employees and to abide by its terms.

Accordingly, we give our employees the following assurances:

WE WILL NOT refuse to bargain in good faith with United Nurses Associations of California/Union of Health Care Professionals, NUHHCE, AFSME, AFL-CIO (Union), as the exclusive collective bargaining representative of its employees in the following collective bargaining unit:

All full-time, regular, part-time and regular per diem nurses employed by the employer at its 5451 Walnut Avenue, Chino, California facility in the following departments:
emergency services, critical care services/intensive care unit, surgery, post-anesthesia care unit, outpatient services, gastrointestinal laboratory, cardiovascular catheterization laboratory, radiology, telemetry/direct observation unit and medical/surgical.

WE WILL NOT withdraw recognition from the Union and fail and refuse to bargain with the Union as your exclusive collective-bargaining representative.

WE WILL NOT In any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed by Section 7 of the Act.

VERITAS HEALTH SERVICES, INC., d/b/a
CHINO VALLEY MEDICAL CENTER

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To

find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

11150 West Olympic Boulevard, Suite 700

Los Angeles, California 90064-1824

Hours: 8:30 a.m. to 5 p.m.

310-235-7352

The Administrative Law Judge's decision can be found at www.nlr.gov/case/31-CA-107321 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 310-235-7123.